

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

original

77-1048

To be argued by
JEROME J. LONDIN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1048

UNITED STATES OF AMERICA,

Appellee,

-against-

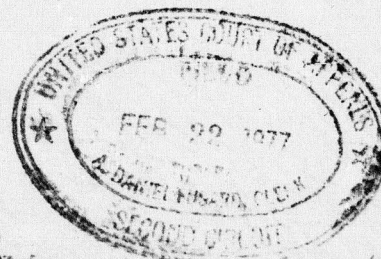
CARL W. ANDERSON,

Appellant.

BRIEF AND APPENDIX FOR APPELLANT ANDERSON

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1048

UNITED STATES OF AMERICA,

Appellee,

-against-

CARL W. ANDERSON,

Appellant.

BRIEF FOR APPELLANT ANDERSON

Preliminary Statement

Anderson appeals from: (1) the memorandum and order of Hon. Whitman Knapp, D.J. dated Jan. 6, 1977, filed Jan. 7, 1977, denying his motion for a new trial under Rule 33, Fed. R. Crim. Proc. (A 11-14; A 10)* and (2) the memorandum and order of Hon. Whitman Knapp, D.J., dated Jan. 31, 1977, filed Feb. 1, 1977, on Anderson's timely motion for reargument, adhering to his original decision denying the Rule 33 motion (A 15-18; A 10).

*

References denominated "A" are to the joint appendix on this appeal.

Anderson was convicted of conspiring to file on Oct. 16, 1969 a false Form X-17A-5, the annual independent audit of Orvis by Haskins & Sells. The indictment was filed on Sept. 10, 1974. The filing of Oct. 16, 1969, the only overt act submitted to the jury, satisfied the statute of limitations by one month. That filing was the subject of the only other count submitted to the jury, and on that count Anderson was acquitted.

The S.E.C. completed most of its interrogations in 1971. On Jan. 13, 1972 it began and concluded its interrogations of Messrs. Clinton, Gamelson and Smith of Clinton Oil Company, a major purveyor of oil and gas drilling "units", whose transactions with Orvis constituted most of the prosecution's case. By mid-1972 the S.E.C. referred the case to the Justice Department, where it languished for two years until mid-July 1974, when the grand jury presentation began.

The four-week jury trial began on April 3, 1975. Two counts were submitted to the jury -- the conspiracy count and the Oct. 16, 1969 false filing count. After two days of deliberations, the jury convicted on the conspiracy count and acquitted on the false filing count. On July 7, 1975 Anderson was sentenced to imprisonment for one year and a day. This Court affirmed on March 8, 1976. United States v. Eucker, et al., 532 F.2d 249. Certiorari was denied on Oct. 4, 1976.

On Nov. 4, 1976, Anderson moved for a new trial under Rule 33, Fed. R. Crim. Proc., on grounds of evidence newly discovered during the pendency of his petition for certiorari that:

(1) Three government witnesses -- Clinton, Gamelson and Smith -- had committed blatant, pre-meditated and conspiratorial perjury concerning the largest single transaction in the case against Anderson -- an \$880,000 sale of 80,000 shares of Clinton Oil Company stock by Orvis to a Clinton Oil Pension Fund -- which perjurious testimony was used successfully by the government: (a) to cross-examine Anderson on the substantive issue and to impeach his credibility; (b) to convince the jury by stressing it six forceful times in summation, which prejudicial language the District Court minimized and understated, hardly crediting the prosecutor's zealous advocacy; (c) to secure this Court's affirmance by mentioning it four times in its appellate brief, including once in italics (Gov. Br. p. 25) and another instance when it characterized the testimony of Clinton, Gamelson and Smith against Anderson as "especially damaging" (Gov. Br. p. 49) -- although at page 4 of its District Court brief in opposition to the Rule 33 motion and in arguing against bail in this Court the Government erroneously and astoundingly claimed that its appellate brief "never once mentioned the 80,000 share trade which is the subject of the

newly discovered evidence"; and (d) to so persuade this Court of the bona fides of Clinton, Gamelson and Smith, in affirming this Court referred to the perjurious testimony.

(2) In order to corroborate their perjurious testimony that the \$880,000 trade was spurious (they were the only witnesses who said so) and that, because it had not been mentioned by Anderson to Gamelson and Smith at their meeting on Aug. 28, 1969 at Orvis, they "got awfully mad", these same three government witnesses concocted a spurious document, Gov. Trial Ex. 113 (A 19-20), which purported to be the original Gamelson-Smith memorandum to Clinton of their meeting on Aug. 28, 1969 with Anderson at Orvis -- a document which reflects no discussion of the trade.

(3) In order to support the integrity of Gov. Trial Ex. 113 (A 19-20), these same three government witnesses suppressed the true Gamelson-Smith memorandum to Clinton (A 21-22), which shows the trade was discussed with Anderson and that the idea had emanated from Clinton at a prior Aug. 22, 1969 meeting in Memphis.

(4) In order to conceal their perjury, fabrication of Gov. Trial Ex. 113 and suppression, these same three government witnesses also suppressed at least three other documents:

(a) The typed transcription of Betty Fornshell's shorthand notes (A 23) on the true memorandum (A 21-22) -- Fornshell in Wichita having taken the dictation by telephone of the true memorandum to Clinton from Gamelson and Smith who were calling directly from Orvis' office in New York immediately after their conversation with Anderson, and Fornshell having also taken Gamelson's expurgations and additions on the typed document upon his return to Wichita from New York (when, Gamelson falsely testified at trial, he "got awfully mad" that nothing had been said to him by Anderson about the trade when he was at Orvis on Aug. 28, 1969 -- Gov. Br. on Appeal, p. 26; Tr. 1168-70*); (b) Gamelson's handwritten memorandum to Clinton stating specifically that he had in fact discussed the trade with Anderson (A 24-25); and (c) the memorandum from Gamelson to Clinton dated Sept. 4, 1969, typed by Sue Marshall of Clinton Oil Company (A 26-27).

The newly discovered evidence came to light in 1976, during the course of pre-trial depositions taken of Clinton Oil Company's former officers and employees in New York Stock Exchange, Inc. v. Sloan, et al., 71 Civ. 2912 (MEL), in the United States District Court for the Southern District of New York, conducted by Milbank, Tweed, Hadley & McCloy, counsel

*References denominated "Tr." are to the trial transcript.

for plaintiff. The documents were produced by Simpson, Thacher & Bartlett, counsel for Clinton Oil Company, a defendant in that case, who became attorneys for Clinton Oil Company after Clinton, Gamelson, Smith and the rest of old management were removed through the efforts of the S.E.C. It was only after Anderson's appeal that the prior removal of the Clinton Oil Company hierarchy resulted in the fortuitous discovery by Simpson, Thacher & Bartlett of the long-suppressed documents, whose great significance was immediately apparent, dealing as they did with the \$880,000 trade which was one of the key issues in the civil litigation against, inter alia, Clinton Oil Company and Mr. & Mrs. Clinton personally.

Opposing the Rule 33 motion, the government persuaded the District Court that Clinton, Gamelson and Smith had not committed perjury, having had no motive to do so, but were merely the victims of a collective lapse of memory which was followed, post-trial, by collective changes of recollection. Since the District Court failed to mention either the concocted, spurious Gov. Trial Ex. 113 (A 19-20) or the true memorandum (A 21-22, A 23) or, indeed, the other suppressed documents (A 24-25, A 26-27), it must be assumed that the government was equally successful in persuading the Court that Gov. Trial Ex. 113 was "the cleaner, revised version" of a redundant "draft."

The District Court denied the Rule 33 motion and, upon a timely motion to reargue, adhered to its original decision on the ground that:

"Assuming, arguendo, that the defendant has established that the witnesses Gamelson and Smith had a motive to perjure themselves before the S.E.C., that they deliberately did there perjure themselves, and that they adhered to their prejured testimony in the trial before us, . . . such perjury . . . is not sufficiently significant to warrant the conclusion that 'truthful' testimony by Gamelson and Smith could possibly have produced a different jury verdict.*"

"*We find it significant that defendant Anderson does not even suggest that either Gamelson or Smith had any motive to effect the outcome of the trial before us." (A 15).

Apart from ignoring Clinton's perjurious testimony that he had told Anderson in Memphis on Aug. 22, 1969 that there was no Clinton Pension Fund and no trade for 80,000 shares of Clinton Oil Company stock, the District Court misunderstood the motives of Clinton, Gamelson and Smith to lie. It was not that they were trying to convict Anderson, but rather that they were lying to save themselves. Their motives were:

(a) to evade staggering financial liability for civil damages of \$5,000,000 in the then pending 1971 action brought by the New York Stock Exchange, which charged Clinton Oil Company and Mr. & Mrs. Clinton with responsibility for Orvis' collapse, mentioning the \$880,000 trade of 80,000 shares of Clinton Oil Company stock; (b) to protect their multi-million

dollar stake in Clinton Oil Company (Clinton owned 10% (Tr. 1188, 1215), Gamelson about 5% (Tr. 1188, 1215), and Smith who had his "every spare dime" in the company, "margined everything", "was leveraged to the limit" and was "a captive of Clinton" had about \$300,000 worth of stock)* -- as a result of their large stockholdings, they would be paying a substantial part of the \$5,000,000 in damages incurred by Clinton Oil Company, and the value of their stock would plummet; (c) to maintain their cushy jobs -- Clinton was the boss, complete with a ranch and all the other perquisites of control; Gamelson was vice-president, general counsel and secretary; and Smith had given up his private law practice to work solely for Clinton Oil Company as counsel and had also sold its securities; (d) to avoid civil and criminal liability when they first launched their conspiracy of perjury, fabrication and suppression at the time of their Jan. 13, 1972 testimony before the S.E.C. on this very subject -- at the time of the trade in 1969 Clinton Oil Company had a \$100,000,000 convertible debenture issue in registration, in which, according to its executive vice-president,

*See App. U, pp. 14-17, in Appendix to Rule 33 Motion (Document 7 to Record on Appeal), four copies of which have been filed. At trial Smith lied to the Court when he testified he had no substantial stock interest in Clinton Oil Company (Tr. 1272, App. W).

Lusk, it had represented to the S.E.C. that it would not purchase its own stock; (e) to escape criminal liability for participating with Sloan, unknown to Anderson, in the "parking" of the 80,000 shares (A 26-27); and (f) having perjured themselves on Jan. 13, 1972 when they testified before the S.E.C. and produced the spurious Gov. Trial Ex. 113 to be, they could tell the truth before the 1974 grand jury and at Anderson's 1975 trial only at the cost of themselves being prosecuted for perjury and a host of other crimes -- a course they chose not to take, persisting instead in the same perjurious testimony, fabrication of a crucial exhibit, and suppression of crucial documents.

The Rule 33 motion and bail and a stay of sentence all having been denied, Anderson, maintaining his innocence, surrendered and is now serving his jail sentence. This expedited appeal followed.

Question Presented

Where three government witnesses -- all called to testify to the same transaction, the largest in the case -- commit identical perjury on that very subject, concoct a spurious exhibit on that very subject which is read to the

jury and stressed by the Trial Court, and suppress crucial documents that are highly material to that very subject; and where the prosecutor effectively uses the foregoing to cross-examine the defendant on the substantive issue and to attack his credibility; and where the prosecutor stresses the foregoing six times in summation, extolling one of the witnesses as "this distinguished lawyer"; and where the government's four references to the foregoing in its appellate brief, one of which is italicized and another of which concedes that the testimony of these three witnesses was "especially damaging" to the defendant, evoke a reference to the foregoing in this Court's affirmance of the conviction:

On a Rule 33 motion, what test should be applied, and applying the correct test, did the District Court err in denying a new trial under Rule 33?

Rule Involved

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part:

"The Court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * *"

Statement of the Case

Testifying about Orvis' sale in August 1969 of 80,000 shares of Clinton Oil Stock to the Clinton Pension Fund, Kilduff (the government's principal witness, who professed knowledge of every aspect of the wrongdoing at Orvis) testified that he thought it was a good trade until May 1970 (Tr. 724-5), long after the filing by Haskins & Sells of Form X-17A-5 on Oct. 16, 1969. The acquitted co-defendant Villani thought it was a good trade (Tr. 2741). Anderson too thought it was a good trade (Tr. 2551-2).

Only the perjurious Clinton, Gamelson and Smith testified there was no such trade -- and they were called by the government for that very purpose. Indeed, Gamelson and Smith, on direct examination, testified to little else (Tr. 1153 et seq.; Tr. 1252 et seq.).

The District Court held that Anderson's motion should be denied because nothing would suggest he "was unaware of the [80,000 share trade] account receivable book entry, or that he believed it to be valid." (A 16). The first observation is correct, but beside the point. The second observation is patently incorrect on the basis of the trial record, including the testimony, not only of Anderson and Villani, but also

of all the other government witnesses -- including Kilduff -- except for the perjurious Clinton, Gamelson and Smith. With that exception, everyone testified he thought the trade was valid. Indeed, one of the suppressed documents shows that the purchase by the "Clinton Pension Fund" was raised by Rick Clinton (A 21-22).

No one denies Anderson knew about the 80,000 share trade. He himself said so. What has been sadly confused by the government, which has misled the Court, is the frequently occurring difference between a bona fide trade and the customer's subsequent failure to pay. Such instances are commonplace. The fact that the trade was not settled did not indicate to anyone -- not to Kilduff, not to Haskins & Sells, not to the other partners, and not to Anderson -- that there was any question of the trade's bona fides.

Everyone knew the unsettled trade was being carried on the books. It was properly posted on Orvis' books. Haskins & Sells was aware of the unsettled \$880,000 trade and accordingly doubled the reserve against Orvis' capital (Tr. 1016-17, 1327-8, 1330-3, 1378-9, 1389-90. See also Haskins & Sells' Note 1 to Form X-17A-5, which reads with respect to customers' cash accounts: ". . . A reserve has been provided for accounts considered doubtful of collection; . . ."). The account was

collateralized, meaning that Orvis had in its position and possession the 80,000 shares in question.*

Recognizing Clinton, Gamelson and Smith as frail underpinnings for the conviction -- even though they alone were expressly called to testify to the mala fides of the \$880,000 trade -- after insisting they did not commit perjury or concoct or suppress crucial documents, the prosecution falls back on Kilduff. However, at trial the Court seriously questioned whether the government had a case absent witnesses other than Kilduff (Tr. 441). And in acquitting Anderson of the substantive false filing count, the jury obviously refused to credit Kilduff's testimony that Anderson was present on Oct. 15, 1969 when representatives of Haskins & Sells reviewed Form X-17A-5 with representatives of Orvis.

Although only Kilduff so testified, and he was sharply contradicted, this Court, treating the evidence in the light most favorable to the government, accepted Kilduff's testimony and found: "It [the jury] could also decide that Anderson, who stood silently by as the false contents of the X-17A-5 report were reviewed with the company auditor in preparation for filing, was not an innocent bystander." 532 F.2d at p. 255.

*All these facts are equally applicable to the Fund of Letters trade.

Recently discovered evidence -- the answers of Haskins & Sells, prepared in July 1976 by its attorneys, Cahill, Gordon & Reindel, to interrogatories propounded in New York Stock Exchange v. Sloan, 71 Civ. 2912 (MEL) -- discloses that Sloan, Eucker and Kilduff, but not Anderson, were present on behalf of Orvis when Form X-17A-5 was reviewed by Haskins & Sells (Affidavit in support of original Rule 33 motion, par. 2(c); Doc. No. 6, Record on Appeal). Simply put, although on the record this Court could, as it did, accept Kilduff's mistaken testimony in this regard, it was a false weight that strongly tipped the scales in this Court. Simple justice dictates Anderson's conviction should not be supported by a broken reed, and a new trial should be granted under Rule 33 in the interest of justice.

In connection with the credibility of Kilduff, the Court should be reminded of the testimony of Peter Schmidt, Esq., whom Kilduff found to be an honorable man whose integrity and veracity he had no reason to doubt. Kilduff, testifying before the New York Stock Exchange, exculpated Anderson. Only after being threatened by the NYSE with prosecution by the S.E.C., the U.S. Attorney, and the District Attorney unless he implicated others, did Kilduff inculcate Anderson. And even then Kilduff told Mr. Schmidt he did so only because the NYSE, which was preparing its \$5,000,000 civil action, insisted on such

testimony ("They won't believe me if I tell the truth"); and, at the same time, he continued privately to affirm Anderson's innocence to Mr. Schmidt. (Anderson Brief on Appeal, pp. 71-7; Tr. 616, 2446-50, 2456-7, 2460-1, 2464, 2604-8, 2612-14).

Moreover, if the government now relies solely on Kilduff, prior to the jury's resumption of its deliberations after dinner on the first of the two days on which it deliberated, Anderson requested and was refused an instruction to the jury that "if you do not believe the testimony of Kilduff, you must acquit Mr. Anderson" (Tr. 3079; Court Ex. 10, Tr. 3080). The instruction was refused as untimely (3081). The jury resumed its deliberations after dinner and continued deliberating until it was excused later that night at 10:05 p.m. and instructed to return the following morning to resume its deliberations (Tr. 3089). At 2:15 p.m. the following day the jury convicted Anderson on the conspiracy count and acquitted him on the substantive count (Tr. 3101-2). The forelady inquired of the Court whether it wanted "any recommendation as to the degree of guilty". The Court did not (Tr. 3102).

The newly discovered evidence goes to the very heart of the case, for, as the Government conceded, three of the four parts of its case against Anderson involved Clinton Oil Company. (The fourth concerned the Fund of Letters transaction,

which gave rise to no conspiracy because Anderson alone was involved and everyone else attacked him for it.)

As the prosecution itself established at trial, the hypothecations involved in the 1969 audit were effected without Anderson's knowledge. However, the government called one Netelkos to establish Anderson's knowledge in the Spring of 1970, long after the fact, of the prior hypothecations effected without his knowledge. Netelkos' testimony was stressed by the government in its appellate brief (Gov. Br. pp. 28-31, 37, 54), which at p. 30 says:

"Netelkos told Sloan and Anderson that the Executive Committee must be told about the hypothecation, but Anderson stated that 'I recommend that you don't do that' (Tr. 1981-1982)". [Italics in original].

This proved to be errant nonsense because, as two government witnesses testified, Netelkos ran Orvis (Kilduff, Tr. 583-4; Mezzetta, Tr. 1889). Nevertheless, persuaded by the forcefulness with which the government presented Netelkos' testimony, and accepting the testimony in the light most favorable to the government, particularly that portion italicized in the government's brief, supra, this Court, in affirming Anderson's conviction wrote:

"By May 1970, the hypothecation of fully paid for customers' securities exceeded six and one-half million dollars. The Government introduced evidence that Anderson, by that time, was fully aware of what was

being done but urged that this knowledge be kept from the other members of the Executive Committee." 532 F.2d at p. 253.

While Anderson's appeal was pending, in November 1975 Netelkos was convicted for unrelated crimes identical or substantially similar to those of which he had accused Anderson of committing at Orvis at a time when Netelkos, as the government's proof showed, himself ran Orvis. Netelkos was convicted in another federal court in connection with the illegal hypothecation of customers' securities. In January 1976 he was sentenced to eleven years' imprisonment and a \$50,000 fine. (Affidavit in support of original Rule 33 motion, par. 68, Document No. 6, Record on Appeal).

In denying Anderson's motion, the District Court called Netelkos "an unmitigated and obvious scoundrel" . . . who "met most questions with pious denials" . . . [but whose] guilt was obvious to all" (A 17). However, without the benefit of observing the demeanor of Netelkos on the witness stand, this Court, at the government's urging, accepted his testimony. Who can say the jury was less persuaded than this Court? On the other hand, if the jury rejected Netelkos, the perjury of Clinton, Gamelson and Smith becomes even more significant. A new trial should be granted under Rule 33 in the interest of justice.

The 80,000 share trade was the largest transaction presented to the jury. It amounted to \$880,000. The government called three witnesses -- Clinton, Gamelson and Smith -- who falsely testified that it had never occurred and introduced into evidence numerous documents emanating from them -- one of which was demonstrably false and the others are now rendered suspect -- to support their perjurious testimony that, at the two meetings attended by Anderson (Memphis on Aug. 22, 1969 with Clinton and Orvis on Aug. 28, 1969 with Gamelson and Smith), Clinton rejected the suggestion (which in fact was his own idea) that a Clinton Pension purchase 80,000 shares of Clinton Oil stock from Orvis, and Anderson never told Gamelson and Smith about the trade, and that they were surprised and "awfully mad" on receiving the confirmation. At trial and on appeal, the prosecution forcefully and successfully argued that Anderson's participation in the conspiracy was shown by his wilful concealment of what he allegedly knew to be the spuriousness of the 80,000 share sale of Clinton Oil Stock by Orvis to the Clinton Oil Pension Fund for \$880,000, which entity Anderson allegedly knew did not exist.

The government relied on Clinton, Gamelson and Smith and on Gov. Ex. 113 (A 19-20) -- Gamelson and Smith's alleged memorandum to Clinton of their Aug. 28, 1969 discussion with

Anderson at Orvis, which contains no reference to the trade, nor to a Clinton Oil Pension Fund.

Clinton testified that at the Memphis meeting on Aug. 22, 1969, in Anderson's presence, Sloan suggested the purchase from Orvis of 80,000 shares of Clinton Oil Company stock by the Clinton Pension Fund, whereupon he, Clinton, said: "Clinton Oil doesn't have a pension fund and Clinton Oil doesn't buy its own shares and, therefore, this matter would have to be discussed with counsel, with Mr. Gamelson and other counsel." (Tr. 2192, App. A).^{*} About two days later Clinton instructed counsel, Gamelson and Smith, to visit Orvis. Clinton identified Gov. Ex. 113 as the memorandum he received from Gamelson and Smith of their Aug. 28th meeting with Anderson at Orvis (Tr. 2207-8, App. C).

Gamelson testified that on Aug. 28th, after their conversations with Anderson and Sloan, he and Smith were given a private room and "we drafted a report to Mr. Clinton on our findings in the course of the day." Gamelson identified Gov. Ex. 113 as "the memorandum that Mr. Smith and I jointly drafted."

^{*}References to App. are to the appendix to the affidavit in support of the original Rule 33 motion, where the previously cited material is reproduced for the Court's convenience. That appendix is Document No. 7 of the Record on Appeal. Four copies of the original moving affidavit (Document No. 6) and of the appendix (Document No. 7) have been filed for the Court's convenience.

According to Gamelson, Gov. Ex. 113 was "based on [their] conversations with Mr. Anderson and Mr. Sloan." (Tr. 1167, App. D). The person referred to in the memorandum as "Betty" was "the secretary in the Wichita office [to whom the memorandum was dictated]" (Tr. 1168, App. D).

Government counsel read Gov. Ex. 113 to the jury (Tr. 1168, App. D). Immediately thereafter he asked Gamelson the following questions and received the following answers:

"Q. Mr. Gamelson, on August 28th when you talked with Mr. Anderson, did Mr. Anderson mention anything to you about an 80,000 share trade of* Clinton Oil stock to the Clinton Oil Pension Fund?

"A. None at all.

"Q. Did he say anything to Mr. Smith, as far as you know?

"A. No, sir." (Tr. 1168, App. D).

Smith testified on direct examination with respect to the August 28th meeting and Gov. Ex. 113 as follows:

"A. Mr. Gamelson and I dictated over the telephone a memorandum of our conversation and my recollection is that Mr. Anderson gave us a private office in Orvis Bros. to make that call, and it was dictated to Mr. Gamelson's secretary in Wichita, Kansas. I could be wrong. We may have made the phone call from somewhere else, but I think it was right in their office, and in any event it was made within 10 or 15 minutes after the conversation ended.

"Q. Government Exhibit 113 in evidence, is that the memorandum that was dictated, sir?

"A. Yes. * * *

*The transcript reads "tradeoff" for "trade of".

"A. I -- after making the phone call and recording with the secretary the conversations that we just had, we left Orvis Bros."

* * *

"Q. Mr. Smith, at any time when you were at Orvis Bros. on the 28th of August, was there any mention made to you about a 80,000 share trade of Clinton Oil stock to a pension fund?

"A. No, there wasn't. I know I made that observation to Mr. Gamelson and -- "

Thereupon Anderson's counsel objected, and the Court said:

"Well, there wasn't."

* * *

"Q. We will get to that in a minute.

Let me just ask you this. Did you ever speak to Mr. Anderson or anybody at Orvis Bros. about 80,000 share trade?

"A. Never to this day.

"Q. Did anybody at Orvis Bros. ever talk to you about the 80,000 share trade?

"A. Never to this day." (Tr. 1256-9, App. F).

On cross-examination Smith was asked the following question and gave the following answer:

"Q. Did you ever talk to Mr. Anderson, Carl W. Anderson, about the 80,000 share transaction in Clinton Oil stock?

"A. Never to this day."

Continuing, Anderson's counsel asked:

"Q. You never in words or substance said -- "

Thereupon the Court interrupted the question, saying:

"THE COURT: He never discussed it. Obviously he didn't do it in words or substance." (Tr. 1273, App. G).

The government incredibly argued that Clinton, Gamelson and Smith all merely had "a lapse of memory", or that there were "changes in recollection concerning events which transpired in 1969." The argument found favor with the District Court (A 16). On the contrary, their lies, fabrication and suppression did not spring full-blown only at the trial in 1975. All of this first emerged when all three testified before the S.E.C. on January 13, 1972 -- when the S.E.C. was investigating Clinton Oil Company's relationship to Orvis. Their trial testimony was a continuation of their conspiracy to lie which first was put into effect at their testimony before the S.E.C. when they told the same lies, produced the same phoney exhibit, and suppressed the same crucial documents (Gov. Ex. 3537 id., pp. 1, 9-11, 36-7, App. H; Gov. Ex. 3536 id., pp. 1, 27-8, App. I; Document No. 6, Record on Appeal, p. 5, fn. 2).

The government dismissed Gamelson's and Smith's real but suppressed memorandum to Clinton concerning the Aug. 28th meeting with Anderson (A 21-22) as a meaningless "draft." This contention is unworthy of the government's duty to seek the truth. That original memorandum contained the very report of

the crucial discussions with Anderson which, before the S.E.C. in January 1972 and at the trial in 1975, they denied occurred. The government's belated claim that the version of the memorandum they gave the S.E.C. in January 1972 and the jury in 1975 was "the cleaner, revised version" is an outrage.

"Cleaner" it was; "revised" it certainly was. However, the "revisions" involved the total expurgation of everything in the original memorandum which showed they were lying before the S.E.C. on January 13, 1972 and at the trial in 1975. The "revisions" were no less than the bowdlerization of every reference to their discussions with Anderson about the big trade, which discussions they steadfastly denied, whose absence the government strenuously argued was proof of Anderson's complicity, which argument was accepted by the jury when it inquired about "participation by silence", and which this Court found to be evidence of Anderson's participation in the conspiracy.

Gamelson and Smith went far beyond the mere denial of any discussion of the sale by Orvis to the Clinton Pension Fund at the Aug. 28th meeting at Orvis with Anderson. They concocted a story concerning their anger at receiving the confirmation of the sale because, they testified, Anderson had not even mentioned the proposed trade (Tr. 1168-70). Of course, the real memorandum proves there was a discussion of a sale by Orvis to the Clinton Pension Fund, at Rick Clinton's suggestion. This concocted lie

about their surprise and anger when they found the confirmation was bound to impress the jury, as it impressed this Court. It shows that their falsehoods, fabrication and suppression were deliberate, and not the result of a collective "lapse of memory." Moreover, one of the suppressed documents (A 26-27) shows that Anderson on Aug. 28th, to Gamelson's knowledge, may not even have known that Sloan had the confirmation sent out.

In January, February and March 1976 depositions of certain former Clinton Oil Company Employees were taken by plaintiff New York Stock Exchange, Inc. in 71 Civ. 2912 (MEL). Plf's Ex. 338 (App. J) (A 21-22) was given to David R. Foley, Esq. of Milbank, Tweed by Conrad K. Harper, Esq. of Simpson, Thacher & Bartlett, who became attorneys for Clinton Oil Company after Clinton and Gamelson were removed from the company, by letter dated Oct. 23, 1975 (Smith deposition, Feb. 25, 1976, pp. 1-2, 43, App. K). During these depositions there came to light several other exhibits, belatedly produced from the files of Clinton Oil Company, which had not been turned over to the S.E.C. or the government by Clinton, Gamelson or Smith or by Clinton Oil Company when they purportedly complied with an S.E.C. request for documents by giving the S.E.C. the spurious Gov. Ex. 113.

At her deposition on March 19, 1976 Betty Fornshell

testified that Plf's. Ex. 338 (A 21-22) is the memorandum dictated to her by Smith. She took down the typed portion in shorthand. She then dictated her shorthand notes to a secretary who typed it. Gamelson later amended and revised what Smith had dictated, which amendments and revisions she noted in shorthand directly on the memorandum. These amendments and revisions by Gamelson were made after it had been typed in Wichita. A day before her deposition, March 18, 1976, she prepared Depo Ex 351 (App. L) (A 23), a transcription of the shorthand notes she had made on the memorandum (Fornshell deposition, March 19, 1976, pp. 1-2, 31-7, App. M).

Fornshell discussed the memorandum with Gamelson, (App. M, pp. 35-6), and Fornshell also recalled discussing with Clinton the substance of Plf's. Ex. 338 (A 21-22) including the shorthand (App. M, pp. 36-7).

A comparison of Gov. Ex 113 (A 19-20) with Plf's. Ex. 338 (A 21-22) dictated by Smith and discussed by Clinton reveals that the following crucial material statement made during the Aug. 28th meeting with Anderson at Orvis was deliberately deleted by Gamelson and concealed from the jury that convicted Anderson:

"Our understanding is that Rick [Clinton] made a number of suggestions to alleviate their [Orvis'] possible problem . . . Another [of Clinton's suggestions]

was he would buy 70,000 shares of Clinton stock from their inventory at \$11.00 per share (Sloan understood the stock would be purchased by a 'Clinton Pension Fund'). They understood this was Rick's offer to help them out."

Lest there be any doubt that the specific trade in question was discussed by Anderson with Smith and Gamelson at their Aug. 28th meeting at Orvis, and that Clinton knew about it, Gamelson's own handwritten memorandum to Rick Clinton upon receipt of the confirmation of the 80,000 share sale to the Clinton Pension Fund -- which memorandum was suppressed -- reads:

"Rick: Bill Anderson and Ferg Sloan in their conversation with Ben Smith and me, referred to this deal." (Ex. 337, App. N, A 24-25).

At his March 17, 1976 deposition, Lusk testified that when the 80,000 share confirmation came to his attention he went immediately to Gamelson, who expressed neither surprise nor anger. Lusk insisted it be repudiated at once, although Gamelson wanted to speak to Clinton first. Neither Gamelson nor Smith nor Clinton mentioned even a possible transaction between Orvis and Clinton Oil or some entity of Clinton Oil involving 70,000 or 80,000 shares of Clinton Oil Company stock that had been discussed either in Memphis or at Orvis in New York (App. S, pp. 46-9). This gives the lie to Gamelson's trial testimony that, after he had found the confirmation in the mail he "got

awfully mad" and telephoned Smith after he was unable to find Clinton or Lusk, and that the telegram repudiating the trade was sent to Orvis as a result of Gamelson's discussion with Smith (Tr. 1168-72, App. D).

When confronted with Plf's. Ex. 338 at his 1976 deposition, Gamelson ascribed it to Smith (App. T, pp. 193-6). Smith passed the ball back to Gamelson and said that the exhibit, previously identified by Fornshell as having been dictated by Smith and revised by Gamelson was "a totally fraudulent, spurious document" (Smith deposition, Feb. 25, 1976, App. U, p. 42). In sum, Smith applauded the competence and skill of Betty Fornshell and never questioned her integrity. However, at war with the obvious truth demonstrated by Plf's. Ex. 338 (A 21-22) and Ex. 337 (A 24-25) that the trade with a Clinton Pension Fund suggested by Rick Clinton had been discussed at the Aug. 28th meeting with Anderson at Orvis, Smith persisted in falsely denying any such discussion. Indeed, he falsely insisted that he had not dictated Plf's. Ex. 338, which he falsely claimed was prepared after Gov. Ex. 113 (A 19-20) "using my words". Expressing his belief that Clinton had in fact sent him to Orvis on Aug. 28th to coincide with the 80,000 share trade, he ascribed Plf's. Ex. 338 to Gamelson (App. U).

In addition to eliciting the testimony of Clinton, Gamelson and Smith and reading Gov. Ex. 113 to the jury at

Anderson's trial, the government pressed Anderson on cross-examination:

"Q Mr. Anderson, do you recall Mr. Clinton telling you and Mr. Sloan that he didn't have a Clinton Oil pension Fund?

"A, No, I don't recall Mr. Clinton telling Mr. Anderson that he didn't have a Clinton Oil pension fund.

THE COURT: Do you recall him telling that to Mr. Sloan?

THE WITNESS: No, because I know they were talking about a Clinton Oil pension fund or profit sharing fund, and I know that this was being discussed, and I do know further that Mr. Clinton said to Mr. Sloan that I must go back and check with the lawyers, and what have you, but Mr. Anderson never heard Clinton say there was no Clinton Oil pension fund, no.

"Q. Did you hear all the details of this meeting about the proposed 80,000 share transaction?

"A. No, I told you yesterday that I remember hearing that there was an 80,000 share transaction, the price was \$11 a share, and that it was in either Clinton Oil pension fund or Clinton Oil profit sharing trust or something of that nature." (App. EE, Tr. 2690-1).

Plf's. Ex. 338 would have shown that a major trade at \$11 a share with a Clinton Pension Fund had in fact been discussed -- the only difference was that it referred to 70,000 shares instead of 80,000 shares. However, Clinton Oil Company, Clinton, Gamelson and Smith had not given it to the S.E.C. or the government. Instead they produced the spurious Gov. Ex. 113, which omitted any reference to that discussion with Clinton in Memphis on Aug. 22nd or with Anderson at Orvis on Aug. 28th.

And so, when government counsel reminded the Court and jury:

"Your Honor, I have already read that memo [Gov. Ex. 113] to the jury so there is no reason to re-read it",

the Court observed:

"The jury will remember it, I am sure." (App. C, Tr. 2208).

In summation, six times the government forcefully argued for Anderson's conviction by stressing, with respect to the 80,000 share trade: (a) "Mr. Anderson with his whole Memphis deal"; (b) Clinton's testimony that he told Anderson in Memphis that there was no Pension Fund: "I don't have a Clinton Oil Pension Fund"; (c) Anderson's testimony that he had no recollection that in Memphis Clinton had allegedly denied the existence of a Clinton Oil Pension Fund: "Mr. Anderson doesn't remember that part either"; (d) the visit to Orvis on Aug. 28th of "Gamelson and Smith, this distinguished lawyer", at which Anderson said "not one word about an 80,000 share trade" (mentioned twice); and (e) "Not one word about an \$880,000 deal."

In pertinent part, the exuberant summation reads:

"The 80,000 share trade, the sixth way. Sloan and Anderson go to Memphis despite the fact that Clinton says there is no pension fund * * *

"The telegram comes in to Sloan. It sits on the books for nine months, ladies and gentlemen, as an open account and is then reversed. The sixth way they prop

up their capital. Who? Sloan, Fergus Sloan's baby and Mr. Anderson." (App. FF, Tr. 2953).

* * *

"But there is more, ladies and gentlemen, than just promoting the conspiracy by not telling the general partnership. They also promote the conspiracy from August 22nd to September 3rd, Mr. Anderson with his whole Memphis deal. I want to spend a few minutes on it. It really shows what Mr. Anderson is all about.

"On August 22nd, two days after that tumultuous general partners meeting at the New York Athletic Club, Anderson and Sloan get on an airplane and they go back to Memphis, Tennessee to see Rick Clinton. * * * No knowledge on the part of Mr. Anderson?

"Sloan: Hey, how about an 80,000 share trade to the Clinton Oil Pension Fund?

"Clinton: I don't have a Clinton Oil Pension Fund.

"Mr. Anderson doesn't remember that part either. I don't have a Clinton Oil Pension Fund." (App. FF, Tr. 2972-2973).

* * *

"What does Clinton do? He sidetracks everything that Sloan and Anderson had hoped for because instead of pumping in another two million, he calls in Gamelson and Smith, this distinguished lawyer that Mrs. Piel talks about, and he says to them." (App. FF, Tr. 2974).

* * *

"Carl Anderson didn't know? Carl Anderson didn't try and help and not one word about a 80,000 share trade that was settled the day before, not one word from Carl Anderson about that 80,000 share trade because Carl Anderson knows if he mentions that trade Gamelson is going to blow the whistle on the whole operation when he goes back to tell Clinton. Not one word about an \$880,000 deal that took place the day before and that

Anderson knew was going to take place because he was in Memphis with Sloan when they talked about it with Clinton. That wasn't something that Sloan was there all alone. Anderson was right there with Sloan." (App. FF, Tr. 2975-2976).

* * *

"Anderson should have told Gamelson and Smith what was happening." (App. FF, Tr. 3001).

The jury was permitted to interpret this alleged silence as Anderson's "active participation" in the conspiracy. In answer to the jury's question about "silence", the Court told the jury that the silence had to be "a planned act" -- the very argument made by the Government in anticipation of the Court's charge to the jury. Had the true facts of the Aug. 28th meeting been known, this aspect of the case would have been withdrawn.

The subject was also stressed by the government on appeal as evidence of Anderson's active participation in the conspiracy:

"At no time did Anderson or Sloan make any reference to the purported sale that day of 80,000 shares of Clinton Oil stock from Orvis to the Clinton Oil Pension Fund (Tr. 1168)." [Italics in original] (Gov. Brief p. 25).

"Gamelson 'got awfully mad' that neither Anderson nor Sloan had said anything to him about such a substantial sale when he had been at Orvis just a few days ago" (Gov. Brief, p. 26).

* * *

"Anderson denied that Clinton had ever said to Sloan that Clinton Oil did not have a pension fund (Tr. 2691). (Contra Clinton, Tr. 2188-93)." (Gov. Brief, p. 39).

* * *

"Especially damaging to the Anderson claim of 'silence' is the testimony of Clinton, Gamelson and Smith concerning Anderson's visit to Memphis on August 20[sic] and the subsequent visit of Gamelson and Smith to Orvis a few days later." (Gov. Brief, p. 49).

In affirming Anderson's conviction, this Court said:

"At the time this purported [80,000-share] sale was taking place, general counsel for Clinton was in New York * * * Clinton's counsel was not informed of the 'sale' of Clinton stock and did not learn about it until his return to Kansas * * *" 532 F.2d at p. 253.

Much more than the 80,000 share trade with a Clinton Pension Fund is involved in the perjury of Clinton, Gamelson and Smith, the suppression of material documents, and the concoction of Gov. Ex. 113. Anderson's ignorance of the "parking operation" was evidence that he was not part of the conspiracy, and it should have been made known to the jury, who would have seen Clinton, Gamelson and Smith in a different light. About 75% of the government's case involved transactions with Clinton Oil Company: the Commission Receivable Account No. 55-1400 involving Orvis' 1969 sale of Clinton Oil and Gas Units; Orvis'

salesmen's share of the commission receivable on the sale of those units; Rick Clinton's subordinated loan account and the securities in it; the 4,344 shares of Clinton Oil stock sent to Orvis; the 5,000 shares of Clinton Oil stock sent to Orvis; the 80,000 share trade; the \$500,000 sent by Rick Clinton to Sloan; and the Kane Trading Account. What is now also called in question by the concoction of Gov. Ex. 113, the suppression of material documents in the files of Clinton Oil Company, and the perjury of Clinton, Gamelson and Smith, is the integrity of the government's case as to all these matters presented to the jury through the testimony of Clinton Oil Company witnesses and Clinton Oil Company documents.

The pervasive perjury and the documentary fabrication and suppression at Anderson's trial are an affront to the integrity of the judicial process. Simple justice demands that Anderson be afforded a trial free of such abominations. Clearly, any jury considering Anderson's case should have been informed of the nature and quality of Clinton Oil Company's witnesses and documents. This Court's answer should be loud and clear. The only meaningful answer is granting Anderson a new trial. The Court and another jury should have an opportunity to re-appraise Clinton, Gamelson and Smith and the Clinton Oil Company documents in the clear light of the 1976 disclosures, particularly

since the government has exonerated Clinton, Gamelson and Smith with no investigation and no affidavit whatsoever -- let alone from any one of the three. Justice demands no less.

ARGUMENT

Generally, the standard applied in determining whether a new trial should be granted pursuant to Rule 33 on the basis of newly discovered evidence is whether that evidence "would probably" have caused the jury to reach a different conclusion. Berry v. State, 10 Ga. 511, 527 (1851), cited in United States v. Costello, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958). However, where the newly discovered evidence is evidence of perjury of a government witness, a less stringent standard is applied. In this context, Rule 33 has been interpreted in a long line of decisional authority, first enunciated in Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), as requiring that a new trial be granted when, without the perjury, the jury might have reached a different conclusion.

As this Court said in United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969):

"Where the conviction is shown to be based even in part upon perjured testimony, however, a court will not stop to inquire as to the precise effect of .

the perjury, but will order a new trial if without the perjury the jury might not have convicted. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956); Larrison v. United States, 24 F.2d 82 (7th Cir. 1928)."

See also United States v. Hiss, 107 F.Supp. 128, 136 (S.D.N.Y. 1952), aff'd., 201 F.2d 372 (2nd Cir.), cert. denied, 345 U.S. 942 (1953).

The standard applied in Larrison, supra, has been uniformly followed in the First, Third, Fourth, Seventh and Tenth Circuits (and in this circuit as well until United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), infra, even where the conviction was based only in part upon perjured testimony. United States v. Marquez, 363 F. Supp. 802 (S.D.N.Y. 1973), aff'd., 490 F.2d 1383 (2d Cir. 1974); United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973); United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973); United States v. Briola, 465 F.2d 1018, 1022 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); United States v. Curran, 465 F.2d 260, 264 (7th Cir. 1972) (dicta); United States v. Strauss, 443 F.2d 986, 989 (1st Cir.), cert. denied, 404 U.S. 85 (1971); United States v. Polisi, 416 F.2d 572 (2d Cir. 1963), citing Mesarosh v. United States, 352 U.S. 1 (1956).

It is clear that under the Larrison test, supra, with the newly discovered evidence in this case the jury, which

was out over two days and acquitted on one of the two counts, "might have" come to a different conclusion concerning Anderson's participation in the conspiracy, because the government stressed the 80,000 share trade with the Clinton Pension Fund and the Aug. 22nd and Aug. 28th meetings in Memphis and at Orvis as the means of drawing Anderson into the conspiracy. Further, the issue of credibility vis-a-vis Anderson and the prosecution witnesses, which the jury resolved in favor of the government, now is shown to be based upon: (a) the perjured testimony of three witnesses; (b) a spurious crucial exhibit manufactured after the fact and tailored to corroborate the perjurious testimony of the three government witnesses; and (c) the deliberate suppression by these perjurious witnesses of documents which would have exposed their perjury against Anderson.

In United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), this Court, while conceding that the Larrison test had always been the standard in this circuit, reconsidered that standard and determined that even where the newly discovered evidence was that of perjury of a witness, the standard to be applied in the granting of a new trial would be the Berry test, to wit, that the jury "would probably" rather than "might" have reached a different conclusion. The standard applied in Stofsky

(by but one of the many panels of this Court which have considered the problem) is not the proper test for this case.

The Stofsky test would deprive the defendant of his Sixth Amendment right to have a jury determine his guilt or innocence after the truth-seeking process has been corrupted by perjury, replacing a jury's verdict with a finding of fact by the Court. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence be fully aired before the jury, where such evidence, developed by defense counsel, may induce a reasonable doubt in the mind of at least one juror.

Moreover, Stofsky is readily distinguishable. Stofsky concerned payoffs by fur manufacturers through one Glasser to union officials. At trial Glasser testified as to the amount he had received from the manufacturers, a portion of which went to Stofsky. A transcript of Glasser's savings account, which showed cash deposits far in excess of the amounts Glasser testified he had received in payoffs, was obtained and given to the defense twelve days before the end of trial. Glasser stated that the additional money was from an inheritance of his wife. At trial the defense neither sought to impeach Glasser's testimony on this point nor did they ask for an

adjournment for the purpose of obtaining further information from the bank. After trial the government furnished the defense with new evidence, obtained from the bank, showing that Glasser had received much larger sums of money from the fur manufacturers than he had testified to at trial or that he had disclosed on his income tax returns. This Court denied a new trial:

"[b]ecause we conclude that the perjury in issue is not of such significance as to have unfairly tainted defendants' convictions . . ." [527 F.2d at 239].

With regard to the chronology in which the newly discovered evidence was exploited, the Court said [527 F.2d at 245]:

"The failure to obtain and exploit the impeaching data until after the jury had rendered its verdict offers strong support for the government's contention that the defense did not exercise due diligence in obtaining the newly discovered impeaching evidence in time for use at trial."

Moreover, the so-called "impeaching" evidence, collateral at best (as opposed to the direct proof here of perjury, fabrication and suppression on a material issue going to Anderson's guilt or innocence) was of little significance, because Glasser's testimony on the material issues "was substantially corroborated" by other evidence, including numerous witnesses [527 F.2d at 240-241], contrary to Anderson's case, where all three witnesses lied, used a spurious exhibit to

buttress their lies, and suppressed the very documents that would have shown them to be lying on an issue going to guilt or innocence -- an issue stressed at trial and on appeal.

After superimposing the newly discovered facts upon the "probability test", the Court determined that the jury probably would not have altered its verdict, stating [527 F.2d at 246-247]:

"Applying the foregoing, we do not believe that the revelation of Glasser's perjury would have altered the jury's verdict. The new evidence of the Glasser's bloated bank accounts is not exculpatory in nature. Glasser's receipt of monies from at least six fur manufacturers was clearly established. It is a non sequitur to suggest that the discovery of Glasser's receipt of larger sums of money from some source establishes that he did not pass to defendants a share of which he concededly received from the fur manufacturers. The key factual issue in dispute -- whether Glasser shared payments with the defendants -- would not have been affected one way or the other by this new evidence . . . Thus, the impeaching value of the disclosure was of doubtful value to the defense as compared with the harm that might result to the defendants by Glasser's explanation." [Emphasis added].

Although there is now a conflict in this circuit as to whether the newly discovered evidence of perjury must be such that the jury "might" have or "would probably" have reached a different conclusion, or, indeed, no conclusion at all, Anderson also satisfies the stringent test. Given the pervasiveness and ostensible quality of the perjured testimony along with the extensive use of the spurious exhibit and the importance of the

suppressed documents, one cannot reasonably argue that these facts, if known to the jury, "would probably" not have resulted in anything other than a guilty verdict. This is particularly so where the jury was out for two days and acquitted on one of the two counts, and where the true memorandum of the August 28th meeting with Anderson at Orvis and the suppressed documents all give the lie to what the prosecution stressed, namely, Anderson's alleged knowledge that there was in fact no 80,000 share sale of Clinton Oil Company stock by Orvis to a Clinton Pension Fund and that the matter was never discussed at Anderson's August 28th meeting with Gamelson and Smith at Orvis. These allegations, now shown to be false, were stressed by the government as its means of both drawing Anderson into the conspiracy as well as impeaching his credibility. How can one seriously contend that, had the truth been told at trial, Anderson "would probably" still have been convicted?

In Stofsky, the Court emphasized that the new evidence was not exculpatory as regards Stofsky, but rather it implicated him further. Thus, although the government witness had perjured himself, the truth would not have benefited Stofsky, it would have damned him further. However, as regards Anderson, the newly discovered evidence is clearly exculpatory, and he should be granted a new trial.

The government conceded below that United States v. Agurs, _____ U.S. _____, 49 L. Ed. 2d 342, 96 S.Ct. 2392 (1976) "throws doubt on the continued viability of the rule enunciated in Stofsky". Although Anderson also satisfies Agurs' "reasonable doubt" test, that case is inapposite, involving the scope of the prosecutor's constitutional duty to disclose exculpatory evidence in the absence of a focused request from the defense. While this "reasonable doubt" test falls somewhere in between the stringent "would probably" test and the more lenient "might have" test, Agurs does not deal with the issue of multiple perjury, the fabrication of a crucial exhibit exploited by the government, and the suppression of crucial documents which would have disclosed the perjury and the spuriousness of the crucial exhibit. This requires a less stringent test.

The proper standard to be applied by this Court in considering the instant motion for a new trial is the Larrison test; but even if the perjured testimony of three witnesses, the fabrication of Gov. Ex. 113, and the suppression of relevant documents is examined in the framework of either of the Stofsky or Agurs tests, the same result is mandated -- this Court should grant Anderson a new trial not only under the broader "interest of justice" branch of Rule 33, but also because it cannot be said that the newly discovered evidence "would not have raised

a reasonable doubt in the mind of a single juror." cf.

United States v. Marquez, 363 F. Supp. at 808.

The relief sought is also mandated by the reasoning of Mesarosh v. United States, 352 U.S. 1 (1956). See United States v. Chisum, 436 F.2d 645 (9th Cir. 1971), where, at page 648 the Court quoted the following language from Mesarosh:

"* * * 'The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.

* * *

'Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

* * *

'The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."

See also Williams v. United States, 500 F.2d 105 (9th Cir.

1974) where, applying the standards established by the Supreme Court in Mesarosh, the Court of Appeals set aside a conviction and granted a new trial, saying (at p. 107):

"In evaluating the significance of Watson's testimony, we are guided by the standards established by the Supreme Court in Mesarosh v. United States, supra. In Mesarosh the Court reversed with directions to grant a new trial because it determined that the allegedly perjured testimony was so material that it could not be determined conclusively by any court that [the] testimony was insignificant in the general case against the defendants.' 352 U.S. at 10-11, 77 S.Ct. at 6. That observation is equally applicable here. Watson was an important witness in the government's case against Williams. He provided the only corroboration of Jackson's testimony that Williams was involved in the first transaction. Without his testimony the jury might not have been convinced that there was enough evidence to find Williams guilty beyond a reasonable doubt. 'Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case.' Mesarosh v. United States, supra, 352 U.S. at 12, 77 S.Ct. at 7. [Emphasis Added.]

CONCLUSION

Anderson's Rule 33 motion conclusively demonstrates -- not by his own testimony, but through recently discovered independent testimony and documents produced by new counsel of Clinton Oil Company -- one of the most blatant cases of mass perjury by government witnesses in this Court's history. Not only has this independent proof conclusively established perjury, it has also conclusively established that a crucial trial exhibit was deliberately concocted by three perjurious witnesses and that they wilfully suppressed other documents which would have disclosed their lies and the fabrication of the exhibit. Not one affidavit has been submitted in opposition.

It is uncontradicted that: (1) Clinton, Gamelson and Smith lied at Anderson's trial when they denied having discussed with Anderson the purchase by the Clinton Oil Pension Fund of 80,000 shares of Clinton Oil stock from Orvis at \$11 per share, for a total price of \$880,000; (2) the crucial exhibit (Gov. Ex. 113) upon which they relied to negate any such discussion -- the Gamelson and Smith purported memorandum of their conversation with Anderson at Orvis on Aug. 28, 1969 -- was a fabrication substituted for the original suppressed memorandum of the Aug. 28th meeting, which indeed refers to Clinton's prior suggestion in Memphis discussed at the Aug. 28th meeting with Anderson, that a Clinton Pension Fund would purchase 70,000 shares of Clinton Oil stock at a price of \$11 per share; (3) Gamelson's handwritten memorandum to Clinton unequivocally stated that Smith and he had in fact discussed the 80,000 share trade with Anderson on Aug. 28th; (4) Anderson did not know the confirmation went out on Aug. 28th; and (5) unknown to Anderson but with the knowledge of Gamelson who discussed it with Sloan and wrote a suppressed memorandum to Clinton, Clinton had secretly agreed with Sloan to take the 80,000 shares of Clinton Oil stock as a "parking operation".

The totality of the foregoing facts -- all clearly documented by independent testimony and exhibits -- mandate

a new trial for Anderson. He maintained his innocence at trial, and continues to do so. A new trial is required in the interest of justice.

Respectfully submitted,

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D. C. Form No. 100

CRIMINAL DOCKET

JUDGE KNAPP

710.859

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Walter J. Higgins, AUSA
	264-6522
1. FERGUS M. SLOAN	
2. CARL W. ANDERSON	
3. DONALD EUCKER	
4. JOHN J. VILLANI	
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ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		1/30/75	Fiel	5-	
Clerk,		2/4/75	Treas		5-
Marshal, 4, 3, 5, 1, 2		4/24/75	Eucker	5-	
Attorney,		7/1/75	Treas		5-
Consp. to viol. S.E.C. laws. 18, 15					
Securities fraud. 371, 78g, 78h & 78ff.					
Consp. to viol. S.E.C. laws. (Ct. 1.)					
Securities fraud. (Cts 2-9)					
(Nine Counts)					

DATE	PROCEEDINGS
9-10-74	Filed indictment.
9-23-74	ALL DEFENDANTS (attys. present) Plead not guilty. Case assigned to Judge Knapp for all purposes. Motions returnable in 10 days. Bail fixed by the court as to all defts. at \$10,000. P.R.B. to be co-signed by the wives. all defts. to be photographed and fingerprinted. Motley, J.
9/30/74	Filed deft. Carl W. Anderson's notice of motion re: extending time for pre-trial motions. ret: 10/4/74.
(OVER)	

74 Crim 859 USA

vs. Fergus M. Sloan, Jr, etal

74 Crim

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
9-30-74	Deft's Villani & Eucker present without counsel. The court appointed, Stanley S. Arkin, Esq. to represent Deft. Eucker & Eleanor Jackson Pie Esq. to represent deft. Villani. Knapp, J.		
9/24/74	T. Kolduff- filed P.R.B. in the sum of \$10,000.		
9/24/74	J. Eucker- filed P.R.B. in the sum of \$10,000.		
9/24/74	F. Sloan- filed P.R.B. in the sum of \$10,000.		
9/24/74	J. Villani- filed P.R.B. in the sum of \$10,000.		
9/24/74	C. Anderson- filed P.R.B. in the sum of \$10,000.		
10/9/74	T. Kilduff- filed notice of appearance by atty. (see atty. list)		
10/9/74	C. Anderson- filed notice of appearance by atty. (see atty. list)		
10/9/74	F. Sloan- filed notice of appearance by atty. (see atty. list)		
11/13/74	J. Villani- filed notice of motion re: bill of particulars and discovery and memorandums in support of motions. ret: 11/25/74.		
12/24/74	C. Anderson- filed affdvt. of Jerome J. Leidin in support of application of 100% for the company along with 11/13/74.		
12/30/74	Filed memo. re: on affdvt. to be 12/24/74. C. Anderson's bill 11/13/74 along with 100% bill to travel to Florida on 12/26/74 on then after and to maintain the company on 11/13/74 by bill can be and return to N.Y. Knapp, J. re		
1/24/75	Filed N.Y. Stock Exchange, Inc.'s affdvt. in opposition to request for stay.		
1/24/75	Filed memo. of law of N.Y. Stock Exchange, Inc.'s in opposition to motion of deft. Villani for a stay of disciplinary proceedings against him by N.Y. Stock Exchange, Inc.		
1/24/75	Filed J. Villani's notice of motion re: stay of proceedings, etc.		

Docket Continuation

DATE	PROCEEDINGS
1/29/75	Filed OPINION # 41820 - ...Accordingly, the defts.' motion to enjoin The New York Stock Exchange is denied. Knapp, J. mn
1/30/75	Filed defts John Villani and Donald Eucker's appeal from order of 1/29/75 denying injunction and/or stay of proceedings, etc. mailed notices.
1/31/75	Filed deft's Fergus M. Sloan, Jr. affidavit & notice of motion directing plttf. to serve a bill of particulars.
1/3/-75	Filed deft's memorandum of law in support of motion Re: Bill of particulars.
1/30/75	Filed defts. John Villani and Donald Eucker notice of appeal from order denying defts. an injunction and/or stay, etc. mailed notice
1/31/75	Carl Anderson- filed notice of motion re: discovery and inspection and affdvt. ret: 2/10/75.
1/31/75	Carl Anderson- filed notice of motion re: in camera inspection of Grand Jury minutes by Court under Rule 6(e) and to dismiss indictment under Rule 12, ret: 2/10/75.
1/31/75	Carl Anderson- filed notice of motion re: order striking prejudicial surplage under rule 7(d).
1/31/75	Carl Anderson- filed memo. of law re: support of motion for discovery and inspection.
1/31/75	Carl Anderson- filed memo. of law re: support of motion for in camera inspection of Grand Jury minutes, etc.
1/31/75	Carl Anderson- filed notice of motion re: dismissal, etc. ret: 2/10/75
1/31/75	Carl Anderson- filed memo. of law re: support of motion for dismissal
1/31/75	Carl Anderson- filed notice of motion re: bill of particulars, etc. ret: 2/10/75.
2-4-75	Filed deft. Anderson's memo of law on support of motion b/p
2/10/75	Deft. Villiani (atty. present) makes application for an extension of bail limits. Limits extended to include the Continental US. without application and foreign countries on 10 days notice to the U.S. Atty's office, wherein, a letter from the U.S. Atty. stating there is no objection will be sufficient for the Court to grant the application Knapp, J.
J2-13-75	Filed memo-end. on motion docketed 1/31/75. Motion for an in camera inspection of grand jury minutes by court under Rule 6(e) and the motion to dismiss the indictment pursuant to Rule 12 is denied. Knapp, J. mn

DATE	PROCEEDINGS	Dat. Judge
02-13-75	Filed memo-end. on motion docketed 1/31/75. Motion to dismiss counts one, eight and nine are denied. See, Rule 7(c) and Rule 8 FRCP. As to the motion to dismiss Counts two through seven of the indictment, see memorandum and order dated 2/12/75. Knapp, J. mn	
02-13-75	Filed memo-end. on motion docketed 1/31/75. Motion to strike prejudicial surplusage in the indictment is denied, except with respect to the last sentence in paragraph one of the indictment. Knapp, J. mn	
02-13-75	Filed OPINION # 41877 - ...In summary, we find that the prosecution for the crimes charged in counts two through seven of the indictment is barred by the Statute of limitations. Accordingly, counts two through seven are dismissed. Knapp, J. mn	
03-06-75	Filed deft. C. Anderson's suppl. memo of law in support of motion to dismiss count 9 of the indictment.	
03-12-75	Filed deft. C. Anderson's notice of motion re: dismissal under Rule 12(b).	
03-12-75	Filed deft. C. Anderson's memo. of law in support of motion to dismiss.	
03-13-75	Filed transcript of proceedings, dated <i>Jan 24, 1975</i>	
03-14-75	Deft. Kildriff & Atty. (Michael C. Devine, Esq.) present. Deft. withdraws his plea of not guilty & pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adj'd. to 5-15-75 at (9:30) Bail conditions cont'd. Deft. Eucker & Atty. (Stanley S. Arkin, Esq.) present. Deft. withdraws his plea of not guilty & pleads guilty to count 9 only. Pre-sentence investigation ordered. Sentence adj'd. to 5-15-75 at 9:30. Bail cont'd. Bonsal, J.	
03-13-75	Filed Memorandum and Order that after reviewing the papers submitted on behalf of this application, it is the court's view that the motion should be denied. Knapp, J. mn , (deft. Anderson's motion for reconsideration of motion to dismiss count 9)	
03-31-75	Deft. Sloan Jr. (Atty. Barry Braustein present) Deft. withdraws his plea of not guilty & pleads guilty to Count 1 only. P.S.I. ordered, sentence adj'd. to 5-15-75 at 9:30 A.M. Bail conditions continued. Conner J.	
04-02-75	Deft. Anderson & Atty. (Jerome J. Londin, Esq.) and deft. Villani & Atty. (Eleanor Jackson Piel, Esq.) present. Jury trial begun before Judge Knapp.	
04-03-75	Trial cont'd.	
04-04-75	" "	
04-08-75	" "	
04-09-75	" "	
04-10-75	" "	
04-11-75	" "	
04-14-75	" "	
04-15-75	" "	

cont'd. on next page

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
4-16-75	Jury trial cont'd. as to defts. Anderson & Villani.
04-17-75	Trial cont'd.
04-21-75	" "
04-22-75	" "
04-23-75	" "
04-24-75	" "
04-25-75	" "
04-28-75	" "
04-29-75	" " Jury retires to deliberate at 12:40PM.
04-30-75	Trial cont'd. and concluded. Jury resumes deliberations at 10AM. Jury returns with a verdict at 2:15PM. Deft. Anderson guilty on count 1 not guilty on count 2. Deft. Villani not guilty on counts 1 and 2. Pre-sentence investigation ordered on deft. Anderson. Sentence adj. to 6-16-75 at 9:30. Deft. cont'd. released on own recognizance. Knapp, J.
5-15-75	Filed transcript of record of proceedings, dated 4/14-15-16/75
5-15-75	Filed transcript of record of proceedings, dated 4/17-21-22-23/75
5-15-75	Filed transcript of record of proceedings, dated 4/24-25-28-30/75
05-28-75	Filed transcript of record of proceedings, dated 5/1/75
06-10-75	Filed deft. Carl W. Anderson's notice of motion re: judgment of acquittal under rule 29(c) and alternatively, for a new trial under rule 33 ret: 6-16-75.
06-12-75	Filed deft. Anderson's suppl. affdvt. in support of motion under Rules 29(c) and 33 and with respect to sentencing.
06-23-75	Filed Govt.'s request to charge.
06-23-75	Filed deft. D. Eucker's notice of motion re: dismiss count 9, etc.
06-23-75	Filed Govt.'s bill of particulars and response to motions for discovery and to dismiss the indictment.
06-23-75	Filed memo. of N.Y. Stock Exchange, Inc. in opposition to motion of deft. Villani for stay of disciplinary proceedings against him by N.Y. Stock Exchange, Inc.
5-23-75	Filed memo. of law in support of deft.'s D. Eucker motion to dismiss counts 2 through 7 of the indictment.
06-23-75	Filed Govt.'s memo. of law.
06-23-75	Filed Govt.'s memo. of law re: deft.'s motion to enjoin.
06-23-75	Filed deft. D. Eucker's notice of motion re: dismiss cts 2-7.
06-23-75	Filed memo. of law in support of deft. Eucker's motion for dismissal of counts 2-7.

DATE	PROCEEDINGS	Date Judge
06-20-75	Filed deft. Anderson's memo. of law in support of motion under Rule 35 to set aside sentence of imprisonment.	
06-25-75	Filed deft. F. Sloan, Jr.'s notice of motion re: withdraw guilty plea, etc.	
6-25-75	Filed transcript of record of proceedings, dated 3-4-75	
6-27-75	Filed transcript of record of proceedings, dated 4-3-75	
06-25-75	Filed deft. Donald Eucker's notice of appeal from judgment of 6-16-75. Mailed copies to U.S. Atty. and deft. on 6-30-75.	
06-30-75	(deft. D. Eucker sentenced 6-16-75 - judgment docketed 6-30-75 pur. Knapp, J.) DONALD EUCKER (atty. present) Filed JUDGMENT - deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of ONE (1) YEAR and ONE (1) DAY. Execution of said sentence is stayed pending appeal. Present bail continued and deft. to file new bail pending appeal. On deft.'s motion, with the consent of the Govt., the open counts are dismissed. Knapp, J. issued all copies.	
06-30-75	(deft. T. Kilduff sentenced 6-16-75 - judgment docketed 6-30-75 pur. Knapp, J.) THOMAS C. KILDUFF (atty. present) Filed JUDGMENT - the imposition of sentence is suspended on count 1 and the deft. is placed on unsupervised probation for a period of THREE (3) YEARS, pursuant to the standing probation order of this Court. On deft.'s motion with the consent of the Govt., the open counts are dismissed. Knapp, J. issued all copies.	
07-03-75	(deft. C. Anderson sentenced 6-16-75 - judgment docketed 7-3-75 pur. Knapp, J.) CARL W. ANDERSON (atty. present) Filed Judgment - deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of ONE (1) YEAR and ONE (1) DAY. Execution of the sentence is stayed pending appeal. Present bail cont'd. and deft. to file new bail pending appeal. Knapp, J. issued all copies.	
07-03-75	(deft. F. M. Sloan, Jr. sentenced 6-16-75 - judgment docketed 7-3-75 pur. Knapp, J.) FERGUS M. SLOAN, JR. (atty. present) Filed Judgment - deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of ONE (1) YEAR and ONE (1) DAY on count 1. Execution of the sentence is stayed pending appeal. Present bail cont'd. and deft. to file new bail pending appeal. On deft.'s motion with the consent of the Govt., the open counts are dismissed. Knapp, J. issued all copies.	
07-03-75	Filed OPINION # 42730 - deft. C. Anderson's moves to set aside judgment of conviction... Accordingly, Anderson's motion to set aside the sentence of imprisonment is denied. Final Judgment will enter within five days. The execution of sentence will be stayed pending appeal. Knapp, J. mm	
07-03-75	Filed OPINION 42729 - deft. F. Sloan moves for leave to withdraw his plea ... In conclusion, I may say that the letter was totally without effect upon the sentence imposed, which is the minimum I felt could conscientiously be arrived at. Accordingly, the motion granting leave to withdraw his plea is denied. Knapp, J. mm	

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D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
06-07-75	CARL. W. ANDERSON-Filed Corrected Judgment-(atty.present)deft. is committed to the custody of the Atty. Gen'l. for imprisonment a period of ONE (1) YEAR and ONE (1) DAY. Execution of the sentence is stayed pending appeal. Present bail continued and deft. to file new bail pending appeal. Knapp,J. issued all copies.
07-08-75	Filed Govt.'s affdvt. re: opposition to deft. Anderson's motion for judgment of acquittal.
07-08-75	Filed Govt.'s affdvt. re: response to motion of deft. Fergus M. Sloan to withdraw guilty plea.
07-16-75	Filed deft. Fergus M. Sloan Jr.'s reply affdvt re: Govt.'s opposition to deft.'s motion to withdraw guilty plea.
07-16-75	C. Andersen-filed notice of appeal from judgment of 6-7-75. Mailed copies to U.S. Atty. and deft on 7-17-75.
07-16-75	Filed notice that the record on appeal has beencertified and transmitted tothe U.S.C.A.
07-16-75	Filed stipulation re: papers to be transmitted to U.S.C.A.
*12-13-74	Filed Govt's Notice of Readiness for Trial.
*6-2-75.	Filed transcript of record of proceedings dtd: March 31-75.
07-28-75	Filed notice that the suppl. record onappeal has been certified and transmitted to the U.S.C.A.
07-29-75	Filed Govt.'s memo. of law re: support of offer into evidence of a summary chart.
07-29-75	Filed notice that the second suppl. record on appeal has been certified and transmitted to the U.S.C.A.
07-31-75	Filed deft. Fergus M. Sloan's notice of appeal from order denying leave to withdraw guilty plea of 7-3-75. Mailed copy to U.S. Atty. and deft.
08-01-75	Filed N.Y. Stock Exchange's notice of motion re: release G.J. testimon ret: 8-7-75.
08-01-75	Filed N.Y. Stock Exchange's memo. of law in support of motion.
08-08-75	Filed memo-end. on motion docketed 8-1-75. It seems likely that I would grant this motion, but I think it appropriate that the deft. be heard. The motion is denied without prejudice to renewal before me as any Part One Judge upon the giving of notice to the deft. in the criminal action. Knapp,J.
08-08-75	Filed transcript of record of proceedings, dated 6-16-75.

DATE	PROCEEDINGS	Date Judge
08-13-75	Filed CJA 20 approval for payment of fees of atty. Mrs. E. Pie' (for deft. J. Villani) Knapp, J. issued all copies CA Clerk	
08-21-75	Filed stipulation designating exhibits to be transmitted to the U.S.C.	
08-21-75	Filed stipulation correcting transcript.	
08-20-75	F. Sloan-filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.	
08-21-75	C. Anderson-filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.	
08-20-75	Filed stipulation as to the contents to be included on the record on appeal.	
09-09-75	Filed N.Y. Stock Exchange's notice of motion to release G.J. minutes.	
09-09-75	Filed N.Y. Stock Exchange's memo. of law in support of motion.	
09-11-75	D. Eucker- filed CJA 20 approval for payment of fees of atty. Stanley Arkin- Knapp, J. issued all copies CJA Clerk.	
09-23-75	Filed memo-end. on motion docketed 9-9-75. Petition granted. Knapp, J. m/n	
04-1-76	D. Eucker-filed plttff's affidavit notice of motion in opposition to motion to withdraw Guilty Plea.	
04-14-76	D. Eucker-filed Govt's Memorandum in opposition to withdrawal of Guilty plea.	
04-14-76	Filed Government's affidavit in opposition to motion to withdraw plea.	
04-28-76	Filed Memorandum from Judge Knapp to Judges Moore, Feinberg and Van Graafeiland re: guilty plea of deft. D. Eucker. mn	
04-23-76	Filed memo-end. on motion docketed 4-1-76. Deft. Eucker's motion for leave to withdraw guilty plea, etc..denied. Knapp, J. mn'	
5-6-76	Filed transcript of record of proceedings, dated Mar. 13 1975, -	
May 6-76	DONALD EUCKER: Filed notice for appeal to 2d CA. Also an order dated April 27-76 denying Eucker's motion for leave to withdraw plea of guilty. Mailed copies to U.S. Atty. and deft. at 131 Sunrise Terrace, Cedar Grove, WI 53009	
05-06-76	Filed true copy of order of the U.S.C.A. that the order and judgments of the District Court are affirmed as to appellants Carl W. Anderson and Fergus M. Sloan Jr., bu the action as to appellant Donald Eucker is remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Clerk judgment entered 5-7-76 m/n(opinion attached)	
05-06-76	Filed notice that the 5th suppl. record on appeal has been certified and transmitted to the U.S.C.A.	

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

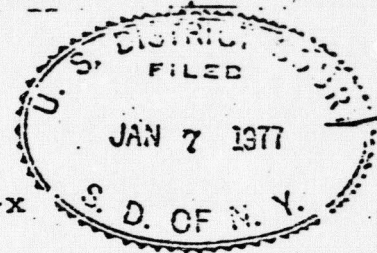
DATE	PROCEEDINGS
05-26-76	Filed deft. Fergus M. Sloan's notice of motion re: set aside the judgment of conviction, etc. ret: 6-11-76.
05-26-76	Filed deft. Fergus M. Sloan's memo. of law re: support of motion to set aside judgment.
06-03-76	Filed transcript of record of proceedings, dated 4-16-76.
06-04-76	Filed transcript of record of proceedings, dated 4-16-76.
06-18-76	Filed deft. F. Sloan's notice of motion re: reduction of sentence. ret: 6-25-76.
06-18-76	Filed deft. F. Sloan's memo. in support of his motion to reduce sentence previously imposed.
06-18-76	Filed deft's suppl. memo. in support of his rule 32(d) motion.
07-12-76	Fergus M. Sloan, Jr. - Filed Amended Judgment (judgment of 6-16-75 amended) deft. committed to the custody of the Atty. Gen'l. for impr. for a period of 52 weeks to be served 5 dys. per week (noon Monday to noon Friday) for a period of 260 days in confinement. Knapp, J. issued all copies.
07-13-76	Filed Opinion # 44747 - Deft. F. M. Sloan, Jr.'s motion for leave to withdraw plea of guilty, etc...denied. Knapp, J. m/n
07-14-76	Filed Opinion #44752 - Deft. F. M. Sloan, Jr.'s motion for reduction of sentence...sent. modified as per amended judgment. (see entry of 7-12-76) Knapp, J. m/n
08-05-76	Filed Order that the bail limits of deft. D. Eucker are extended to include the S.D.N.Y., the Dist. of New Jersey and the Middle Dist. of Penn. for the purpose of attending the wedding of his niece from 8-7-76 to and including 8-8-76., and that except for the provisions of the foregoing paragraph, the deft. shall abide by and comply with all terms and provisions of his bail bond and the deft. shall not depart from the S.D.N.Y. and the Dist. of N.J. Knapp, J. m/n
08-17-76	Filed copy of J & C with marshals return. (SLOAN) Deft. delivered to M.C.C. on 07-19-76.
8-17-76	Filed copy of J & C with marshals return. (SLOAN) Deft. delivered to M.C.C. on 07-19-76.
08-23-76	Filed deft. D. Eucker's notice of motion re: reduction of sent. ret: 9-17-76.
08-27-76	Filed true copy of order of the U.S.C.A. that the deft. D. Eucker's notice of appeal from judgment of 4-27-76 is affirmed in accordance with the opinion of this Court. Clerk Judgment entered Clerk 8-30-76 m/n
09-16-76	Filed memo-end. on motion docketed 8-23-76. Deft. Eucker's motion for reduction of sent. denied...but sent. to be modified as indicated. Deft. to surrender on 10-8-76. Knapp, J. m/n
10-06-76	Deft. D. Eucker (atty. not present) Filed Modified Judgment - judgment of 6-16-75 is modified. The prison sent. imposed by the Court shall be served on weekends and holidays in accordance with the dates on the schedule attached hereto, commencing on Fri. 10-8-76, at 6PM. each period of incarceration shall begin, thereafter at 6PM. on the date indicated by an asterisk. Knapp, J. issued all copies.
10-14-76	Filed transcript of record of proceedings, dated 6-3-76.
10-20-76	D. Eucker - filed J & C, and marshal's return deft. delivered to: copy forwarded by Marshal to Warden MCC on 10-8-76.

DATE	PROCEEDINGS	Dist Judge
11-01-76	Filed deft. Carl W. Anderson's motion of motion re: new trial, etc. re: 11-01-76.	
11-01-76	Filed deft. F. Blum's notice of motion re: redemption of serv. re: 11-01-76.	
11-02-76	Filed deft. F. Blum's memo. of law re: support of motion re re: 11-01-76.	
11-02-76	Carl W. Anderson-filed true copy of order of the U.S. Supreme Court that the petition of C. Anderson for a writ of certiorari to the U.S.C.A. 2nd Circuit is denied. Clerk, m	
11-18-76	Filed memo-add. on motion docketed 11-9-76...Motion denied, etc. Knapp, J. m/n	
12-27-76	Filed Memorandum and Order that the Warden of M.CC having decided to grant deft. Eucker a 2 day furlough over the Christmas holiday it is ordered that the schedule of dates of incarceration be amended accordingly. Knapp, J. m/n	
01-07-77	Filed MEMORANDUM AND ORDER.- Deft. Anderson motion for new trial pursuant to Rule 33 denied. Knapp, J(mn)	
01-11-77	Filed deft. Anderson's notice of motion re: reargument and if denied, stay pending appeal.	
01-11-77	Filed deft. Anderson's memo. of law re: support of motion for reargument, etc.	
02-01-77	Filed Memorandum and Order- After carefully considering the affdvt. and memorandum in support of deft's Anderson's motion for reargument of his R.33 motion for a new trial, we are constrained to adhere to our original decision to deny the R.33 motion...The application for a stay pending appeal is denied. Knapp, J. m/n	
02-02-77	Filed deft. Carl W. Anderson's notice of appeal from orders of 1-6-77 and 1-31-77. Mailed notices.	
2-8-77	FILED GOVT'S MEMORANDUM IN OPPOSITION TO ANDERSON'S MOTION TO REARGUE.	
2-9-77	FILED DEFT ANDERSON'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO REARGUE.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By W. H. Harrison
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

- against -

CARL W. ANDERSON,

Defendant.

MEMORANDUM AND ORDER

74 Cr. 859

KNAPP, D.J.

Defendant Anderson has moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on grounds of newly discovered evidence. We conclude that such motion must be denied.

The general background of this case is fully set forth in the Court of Appeals' opinion affirming the judgment of conviction, United States v. Eucker (2d Cir. 1976) 532 F.2d 249, cert. denied (10/4/76) U.S., and need not here be repeated. Suffice it to say that defendant was convicted of a conspiracy on the part of the major partners of Orvis Brothers to keep false books and make misleading reports to the SEC. According to the court's instructions to the jury, Anderson could not have been convicted unless it had been established beyond a reasonable doubt that he had had (Tr. 3031-2):

"Knowledge of the basic unlawful object of the conspiracy, in this case, deceptive record keeping and deceptive filing with the S.E.C.

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to conceal financial weakness; and that it was his deliberate intent to further that unlawful objective."

The main thrust of this motion is based on the theory that three of the government's witnesses had committed "perjury" with respect to a certain transaction. As a result of that transaction the Orvis books showed an account receivable in the amount of \$880,000 (in lieu of the ownership of stock of that value, which stock under SEC regulations had to be listed at a 30% discount) whereas in fact no such account receivable existed.

The government, in opposition, argues - quite persuasively - it appears to us - that the defendant has not established that the witnesses in question were guilty of perjury but has shown only changes in recollection concerning events which transpired in 1969. Specifically, defendant has not made it all clear to us how any of the witnesses had any motive to perjure himself in the manner suggested. However, we need not pass on that question but assume for present purposes that the witnesses did indeed commit perjury at trial.

The reason we must deny the motion is that we cannot find that the result would have been any different had the witnesses in question told the "truth" as defendant now conceives it. There is nothing in such "truthful" testimony which would suggest that defendant was unaware of the account receivable book entry, or that he believed it to be valid. Indeed, as the government suggests in its opposing memorandum, the newly discovered "truth" seems to be more incriminating to the defendant than the trial "perjury".

Nor was the overall evidence such that we can believe the outcome could have been affected had Anderson been able to demonstrate to the jury that these particular witnesses had indeed deliberately lied before/ ^{it.} However reprehensible such conduct might be, it could have no logical effect on the outcome of the trial. These witnesses were in no sense mainstays of the prosecution, they had no imaginable interest in the outcome, and it is not suggested that the government connived at - or was even aware of - their "perjury".

In the circumstances it is not necessary to discuss the impact of United States v. Agurs (June 24, 1976) _____ U.S. _____, 44 U.S.L.W. 5013 on the previously existing law in this Circuit.

Defendant's other two contentions merit but brief comment.

One Chris Netelkos was a government witness. He was an unmitigated and obvious scoundrel. At the time of trial he was under indictment in the District of New Jersey. He was cross-examined about the allegations of that indictment. Although he met most questions with pious denials, his guilt was obvious to all. His conviction could not have been a surprise to anyone.

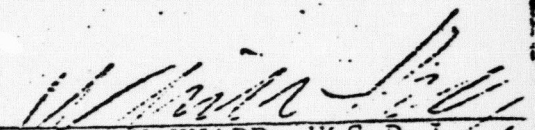
Defendant's last point is that the firm of Haskins & Sells, answering an interrogatory in another litigation, suggested that defendant Anderson had not been at a certain meeting at which a certain document had been discussed. That interrogatory answer does no more than reflect the recollection of a Haskins & Sells partner who testified to the same effect at the trial. It is neither "evidence" nor "newly discovered".

For the foregoing reasons, the motion is denied.

SO ORDERED.

Dated: New York, New York

January 6, 1977.


WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

- against - :

CARL W. ANDERSON, :

Defendant. :

MEMORANDUM AND ORDER

74 Cr. 859

KNAPP, D.J.

After carefully considering the affidavit and memorandum in support of defendant Anderson's motion for reargument of his Rule 33 motion for a new trial, we are constrained to adhere to our original decision to deny the Rule 33 motion.

Assuming, arguendo, that the defendant has established that the witnesses Gamelson and Smith had a motive to perjure themselves before the SEC, that they deliberately did there perjure themselves, and that they adhered to their perjured testimony in the trial before us, we are driven to the conclusion that such perjury (i.e. the difference between the allegedly perjurious version given at the trial and the version now claimed by defendant to be truthful) is not sufficiently significant to warrant the conclusion that "truthful" testimony by Gamelson and Smith could possibly have produced a different jury verdict. *

* We find it significant that defendant Anderson does not even suggest that either Gamelson or Smith had any motive to effect the outcome of the trial before us.

Perhaps the best gauge of the significance of Gamelson's and Smith's testimony would be the extent and manner of its use in the prosecutor's summation. We find that in the 59-page summation the prosecutor made but 6 references to their testimony, all of which appeared to be quite casual. The summation starts on page 2944. Seventeen pages later, on page 2961, the following appears:

"Mr. Anderson, the man who, when Lynn Gamelson and Benjamin Smith are sent up by Rick Clinton to see what is going on at Orvis Bros., and Sloan isn't there, the man who automatically -- these men are sent to him, they didn't ask to see Mr. Anderson, Sloan is not there, automatically they are sent in to see Anderson about the financial condition of the firm."

On page 2967, it is indicated that the 80,000 share deal was "hidden" from Gamelson and Smith just as it had been from the "general partnership" and from Haskins & Sells".

At 2970-71 Gamelson and Smith - but not the 20,000 share deal - were again mentioned. At this point... it was only observed that Anderson had given them a rosy picture of the firm's finances, which they had transmitted to Mr. Clinton.

At 2974-5 the prosecutor again refers to the rosy picture Anderson is alleged to have given Gamelson and Smith, and also mentions that he did not say "one word" about the 80,000 share trade.

At 2984 the two men are mentioned again but only to make the point that Anderson (who had sought to suggest

that he was too preoccupied with his own affairs to know what was going on at Orvis Bros.) had not been "too busy" to see them when they came up from Memphis.

The last mention of either of these witnesses is on page 2998, where the prosecutor made a somewhat enigmatic reference to the fact "that Anderson's and Sloan's plan with Rick Clinton [had] backfired when Gamelson came up to New York."

Thus it appears that there were only two - or possibly three - references to the fact claimed to have been established by the "perjurious" aspect of the Gamelson-Smith testimony, i.e. Anderson's failure to speak to them about the 80,000 share transaction. However the prosecutor, in mentioning this fact did not seem to be arguing that it had any importance of its own, but seemed merely to be citing it as typical of Anderson's pattern of silence and evasion. It seems obvious that had Gamelson and Smith told the "truth" (as the defendant now envisages it) the prosecutor would merely have eliminated this particular illustration of secretiveness, and the thrust of his argument would have remained unchanged.

Accordingly we adhere to our original conclusion that there is no reasonable ground for believing the verdict could have been different had Gamelson and Smith told the "truth" as the defendant now envisages it.

We have made no attempt to deal with defendant Anderson's analysis of the Court of Appeals opinion. We understand our function to be to determine what effect - if any - the purported perjury might have had on the jury. If the defendant feels that he can persuade the Court of Appeals that it had in some way been misled by the Ganselson-Smith testimony, he should address his arguments to that tribunal.

The application for a stay pending appeal is denied.

SO ORDERED.

Dated: New York, New York

January 31, 1977.

WHITMAN KNAPP, U.S.D.J.

A 19
CLINTON OIL COMPANY

MEMORANDUM

FROM: Lyndon Gamelson &
Benjamin A. Smith

Date: August 28, 1969

TO: R. P. Clinton

Subject:

(Note from Betty: Ben Smith dictated the following memorandum to me. I then talked to Lyn and he added a couple of items.)

Lyn learned that his subordinated loan had never been processed and so he picked up his stock from Orvis Brothers. They can't be too hard up for money since they did not bother to process his loan with the New York Stock Exchange.

The next item covered was a suggestion from brokers that Orvis Brothers had been disposing of a substantial amount of Clinton stock. The record they read from would indicate that this was not the case. They hold more of it in their inventory now than a month ago. They had 620,000 shares a month ago, and now have 660,000 shares in their firm account and in their customers' street name account, although in the last week it went down by 10% which they point out is only 2% of their holdings, and an insignificant change in their position. Gerry Kane is bidding 9-1/2 this afternoon.

We mentioned that a request for assistance had been made to Rick, and we wanted to know exactly what their financial situation was. Sloan was at his house and we talked to Anderson first and then both of us were on the line for a lengthy conversation with Ferg Sloan.

The New York Stock Exchange requires that debt cannot be more than 20 times the capital, and a few days ago they were afraid their debt might be greater than the allowable, which might incur some stock exchange restrictions. They had pointed out to Rick that the auditors would be coming (they are here today). It now appears that their debt ratio will be all right, perhaps only 15 to 1. They will know probably in a matter of days. We left it that if Rick did not call Sloan by mid-day on Tuesday, then Sloan would call him to discuss the Oklahoma meeting, because it appears that after our discussion with Anderson and Sloan they are making no stock request for help.

It is Lyn's and my view that we will hear no more about this whole thing if the results of the audit are as they now expect. If they are over the 20 to 1 ratio they will probably be back to you about it. They do not regard your suggestions as a definite commitment, but rather friendly suggestions.

CLINTON OIL COMPANY

MEMORANDUM

FROM:

Date: August 28, 1969

TO: R. P. Clinton

Subject: Page -2-

The auditors who are there are Haskins & Sells who did the audit a year ago, since they tell us the auditors are there at the request of Orvis rather than at the request of the New York Stock Exchange.

Apparently one of the things that is concerning them is that there has been quite a drop in the price of some of the stocks they are holding, and they mentioned specifically the price drops in the various "Spellman stocks" which they are holding.

From: Lyndon Gamelson & Ben Smith ~~(as dictated by Mr. Smith)~~

To: R. P. Clinton

EXHIBIT 338
 IDENTIFICATION
 2/20/76

Lyn learned that his subordinated loan had not been recorded

R. L. with the New York Stock Exchange, and the Stock Exchange called Orvis

Brothers. When we arrived at the Orvis Brothers' office, they gave him ^{returned} all of his stock back since it was not a completed transaction.

The next item covered was the suggestion from brokers that Orvis Brothers had been disposing of a substantial amount of Clinton stock. The record they read from would indicate that this was not the case. They hold more of it in their inventory now than a month ago.

They had 620,000 shares a month ago, and ^{now} have 660,000 shares ^{now}

although in the last week it went down by 10%, which they point out is only 2% of their holdings and an insignificant change in their position. They

~~offered to show us the records, but we declined to look at them.~~

* We suggested that Rick was concerned about the discussions he had had with Sloan and others, and whether or not theirs was a critical situation, a demand or a request for assistance, and felt that since Orvis Brothers and Clinton Oil were members of the same family, it would help

to be very candid with each other. Sloan was at his house and we talked to

Anderson first, to find out if he knew something that Sloan didn't. Sloan

~~had not talked to Rick apart from their meeting at the Country Club at the~~

~~time of the funeral.~~ The New York Stock Exchange requires that debt

cannot be more than twenty times the capital, and they were afraid their

debt might be greater than the twenty percent allowable, which might incur

some stock exchange restrictions. They had pointed out to Rick that the

auditors would be coming (they are here today). Our understanding is Rick made a number of suggestions to alleviate their possible problem.

One was he would loan Frank Doggrell 50,000 shares of Clinton stock to enable Doggrell to put in more capital in the firm. Another was he would buy 70,000 shares of Clinton stock from their inventory at \$11.00 per share (Sloan understood the stock would be purchased by a "Clinton Pension Fund"). They understood this was Rick's offer to help them

out. It now appears that their capital to debt ratio will be all right, perhaps only 15 to 1. They will know probably in a matter of days.

It was left that if Rick did not call Sloan by midday on Tuesday that Sloan would call him, and that will be primarily to discuss the

Oklahoma meeting

It is Lyn's and my view that we will hear no more about this

whole thing if the results of the audit are as they now expect. If they are over the 20-1 ratio they ^{will probably} ~~would be~~ back to Rick about it. They do not

regard Rick's suggestions as definite commitment, but rather friendly suggestions, ^{of} ~~of long standing~~ relationship. We got no impression from

the meeting in Memphis that there was any gun to Rick's head. They

merely explained that they had a stock exchange difficulty and were asking for help.

Reps Ex 351

1. Ben dictated to me and I talked to Lyn and he added a couple of things. (Put both names at bottom).
2. . . . in their firm account and in their customers' street name accounts
3. Jerry Kane is bidding 9 1/2 this afternoon.
4. . . . and then both of us were on the line for a lengthy conversation with Ferg Sloan.
5. . . . a few days ago
6. . . . because it appears that after our discussion with Anderson and Sloan, they are making no stock requests for help.
7. The auditors who are there are Haskins & Sells who did the audit a year ago, since they tell us the auditors are there at the request of Orvis rather than at the request of the New York Stock Exchange.

Apparently one of the things that is concerning them is that there has been quite a drop in the price of some of the stocks they are holding, and they mentioned specifically the price drops in the various "Spellman stocks" which they are holding.

Betty Farnahill

March 18, 1976

Billie to Corner ^{A.24} Bros 10 is 7th St.

Reference your confirmation
notice concerning 80,000
share of Clinton Oil Co. stock.
I made no firm commitment
to buy this stock so please
cancel this confirmation

R. P. Clinton

Rich: Bill Anderson and
Fung Sloan, in their conversation
with Ben Smith and me, referred to
this deck

PLAINTIFF'S
DEFENDANT'S
EXHIBIT 337
FOR IDENTIFICATION
DATE 2/20/76
R. K.

Wire to Orvis Bros New York City

Reference your confirmation
notice concerning 80,000
share of Clinton Oil Co. stock.
I made no firm commitment
to buy this stock so please
cancel this confirmation

R. P. Clinton

Rick: Bill Anderson and
Ferg Sloan, in their conversation
with Ben Smith and me, referred to
this deal.

A 26
MEMORANDUM

DATE 2/17/76

EX. 291

FROM: Iva Carnelson

Date: September 4, 1968

TO: Nick Clinton

Subject: Orvis Brothers

Miss Richter, who is Ferg Sloan's assistant, phoned earlier today saying she had received the telegram and talked to Mr. Sloan about it, and that 'Mr. Sloan thought he had a firm deal with Mr. Clinton'.

I told Miss Richter that nothing had been said to Fen Smith and to me last Thursday about there being a firm deal, and nothing was said about a confirmation having gone out. Miss Richter's reply was, 'It may be that Mr. Bill Anderson did not know anything about it.'

Miss Richter said she had been instructed to put the transaction on their books as if it were a firm deal.

* * *

Ferg Sloan called about 3:30 and said that he thought he had explained that this was intended to be what he called a 'parking operation', and that he really did not want to sell the stock, but he wanted to improve their financial picture for the time being. I asked him if he meant that they would commit to taking the stock back by a certain date. He said that is what he meant, and that it would be done soon. I asked him to give me a specific date so that I would be able to include this in the information I would convey to Mr. Clinton.

At 5:00, Ferg Sloan called back and said that the stock would be confirmed back to Orvis by the first of October, possibly in 2 or 3 deals rather than 1. I asked him if he meant that the stock had to be paid for, and I told him I didn't see how it could be paid for. He said, 'Either way', but at the present time he wanted the sale acknowledged as set forth in the confirmation.

I told him that all I could do would be to convey this message to you.

Ferg said he was going to call me in the forenoon. I expect to be in the office on Friday until about 1:30 when I have a doctor's appointment.

I Grah

BEST COPY AVAILABLE

MEMORANDUM

FROM: Lyn Gamelson

DATE: September 4, 1969

TO: Rick Clinton

SUBJECT: Orvis Brothers

Miss Richter, who is Ferg Sloan's assistant, phoned earlier today saying she had received the telegram and talked to Mr. Sloan about it, and that Mr. Sloan thought he had a firm deal with Mr. Clinton.

I told Miss Richter that nothing had been said to Ben Smith and to me last Thursday about there being a firm deal, and nothing was said about a confirmation having gone out. Miss Richter's reply was, "It may be that Mr. Bill Anderson did not know anything about it."

Miss Richter said she had been instructed to put the transaction on their books as if it were a firm deal.

* * *

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I told him that all I could do would be to convey this message to you.

Ferg said he was going to call me in the forenoon. I expect to be in the office on Friday until about 1:30 when I have a doctor's appointment.

LG:am

COPIES RECEIVED
ROBERT B. FISKE JR.
FEB 22 1977
U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION